Summary: The Plaintiffs attempted to offer "rebuttal" expert testimony. The Court, sua sponte, ordered the exclusion of the "rebuttal" expert testimony and supplemental opinions of the Plaintiffs' case-in-chief expert witness, finding that the offering of the "rebuttal" expert witness was not timely made, the "rebuttal" expert witness is being offered to advance new theories, and that the supplemental opinions of the case-in-chief expert witness are an attempt to insert the "rebuttal" expert witness's testimony into the trial.

Case Name: Stroklund, et al. v. . Thompson/Center Arms Company, Inc., et al.
Case Number: 4-06-cv-08
Docket Number: 259
Date Filed: 1/4/08
Nature of Suit: 365

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Clinton "Pete" Stroklund and Rebecca "Becky" Stroklund, Plaintiff, vs. Thompson/Center Arms Company, Inc., Blackpowder Shooting Sports, Inc., and Clean Shot Technologies, Inc., Defendants.	)	**SUA SPONTE ORDER EXCLUDING EXPERT TESTIMONY OF DR. HAMILTON AND SUPPLEMENTAL OPINIONS OF CHARLES POWELL** Case No. 4:06-cv-08

I. BACKGROUND

This dispute arises out of an explosion of a muzzle loader rifle on December 4, 2004. The explosion caused injuries to, and the subsequent amputation of, the left hand of the plaintiff, Clinton "Pete" Stroklund. On February 2, 2006, Pete and Rebecca "Becky" Stroklund filed a complaint in federal court against Thompson/Center Arms Company, Inc., the manufacturer of the rifle; Clean

Shot Technologies, Inc., the manufacturer of the gun powder used in the rifle on December 4, 2004; and Blackpowder Shooting Sports, Inc., the manufacturer of the bullet used in the rifle. Discovery has been ongoing since the commencement of the lawsuit. There have been a number of modifications to the Scheduling/Discovery Plan in an attempt to accommodate the parties and streamline the flow of the litigation.

The Court's Scheduling/Discovery Plan and Order filed on June 22, 2006, established a deadline of February 1, 2007, for the disclosure of expert witnesses by the plaintiffs, and a deadline of March 16, 2007, for the disclosure of expert witnesses by the defendants. See Docket No. 28. On January 26, 2007, the parties submitted a motion to modify the Scheduling/Discovery Plan. See Docket No. 76. In that motion, the parties agreed on a revised deadline of March 15, 2007, for the disclosure of expert witnesses by the plaintiffs and April 30, 2007, for the disclosure of expert witnesses by the defendants. Judge Karen K. Klein granted the motion on January 29, 2007. See Docket No. 78. On March 13, 2007, the parties again submitted a stipulation to modify the Scheduling/Discovery Plan to establish new deadlines for the disclosure of expert witnesses. See Docket No. 79. Specifically, the parties agreed that the plaintiffs would disclose all liability expert witnesses by April 16, 2007, and the defendants would disclose their expert witnesses by May 31, 2007. The new deadlines for the disclosure of expert witnesses were adopted by the Court on March 14, 2007. See Docket No. 81. Thereafter, on July 20, 2007, the parties submitted another stipulation to reset the trial to January 22, 2008. See Docket No. 119. That stipulation was adopted by the Court on July 24, 2007. See Docket No. 125. Thus, by agreement of the parties, the plaintiffs' deadline to disclose liability expert witnesses was April 16, 2007. In the stipulation submitted to the Court on July 20, 2007, the parties also agreed to retain "all current discovery deadlines despite the

extension of the trial date," except deadlines to complete expert depositions. See Docket No. 119. The record reveals that all parties have had more than sufficient time to retain and disclose their expert witnesses.

On December 21, 2007, the Court held a status conference to address a number of discovery issues. During that status conference, the Court was informed that the plaintiffs had recently retained a "rebuttal" expert witness, i.e., Dr. Benjamin Carter Hamilton. The Court was informed that Dr. Hamilton intended to rebut the defendant's theories of liability and that Dr. Hamilton intended to express opinions concerning the cause of this accident which he attributed to a pre-existing flaw or defect in the gun barrel. At the time of the status conference on December 21, 2007, neither Dr. Hamilton's CV nor his opinions had been conclusively established nor disclosed to defense counsel.

Needless to say, during the status conference on December 21, 2007, counsel for each of the defendants objected to the late disclosure of Dr. Hamilton as a "rebuttal" expert witness. At that time the Court expressed concerns and reservations about the late disclosure of a "rebuttal" expert witness.

On December 27, 2007, counsel for the plaintiffs (George Eck) sent a faxed letter to all defense counsel enclosing Dr. Hamilton's CV as well as a detailed report entitled "Investigation of Brittle Gun Barrel Failure." See Docket No. 241. Dr. Hamilton's opinions and conclusions are essentially as follows:

> 1. Based on Mr. Powell's impact testing and the carbon content of 1137, the gun barrel material shows a transition from ductile to brittle around 32°F; however, apart from Mr. Powell's tests, representative testing was not performed at this lower temperature, only at room temperature, and many of the conclusions drawn concerning the barrel failure are misrepresentative. The pressure testing from HP White, therefore, is not representative of the gun barrel at the actual operating temperature.

2. In order to properly assess the yield conditions in a thick-walled pressure vessel, the Von Mises' Yield Criterion should be applied. According to Von Mises, the pressure to bring about yielding on the inside radius is approximately 23000 psi and on the outside radius is approximately 50000 psi.

3. Due to the ductile to brittle transition of 1137 near 32°F, the pressure that leads to yielding on the inside radius should be considered as the limiting, failure pressure. Due to the brittle nature of the material at this lower temperature, the damage tolerance is significantly reduced. Due to the ductile to brittle transition of 1137, this material is not an appropriate selection for this application.

4. The conclusions drawn by Mr. Fazio and Dr. Fadala are not supported by the body of evidence. Other explanations and scenarios are available that do not require an obstruction, improper loading, atypical loading or smokeless powder.

5. Examination of the fracture surface on the right hand side of the dovetail section indicates a pre-existing flaw at the intersection between the rifling and bore. Due to the reduction in fracture toughness of the barrel material at 32°F, the crack was of sufficient size to lead to catastrophic failure when the gun was discharged. The pre-existing flaw is a defect in the 1137 steel that substantially contributed to the barrel failure.

6. The impact data collected by Mr. Powell definitely shows that the fracture toughness of the 1137 will decrease with decreasing temperature. The fracture toughness was never measured at 32°F, but it is imperative to know this material behavior in order to properly assess the failure of the gun barrel.

On January 3, 2008, defendant Blackpowder Shooting Sports submitted a motion in limine to exclude the testimony of Dr. Hamilton. See Docket Nos. 254-2 and 255-2. It is anticipated that there will be additional motions in limine filed within days by the other defendants. The Court also anticipates that there will be a litany of additional motions in limine filed next week relative to supplemental opinions of Charles Powell, the plaintiffs' liability expert in their case-in-chief. Due to the fact that this case is closely approaching the trial, the Court felt it was imperative to issue a

sua sponte order to address the disclosure of a "rebuttal" expert witness at this stage of the litigation.

II. LEGAL DISCUSSION

It is well-established that courts are required to set discovery deadlines and have the authority to enforce those deadlines through the imposition of sanctions. Fed. R. Civ. P. 16(b) and (f). Rule 26(a)(2)(A) of the Federal Rules of Civil Procedure requires all parties to disclose any expert witnesses who may testify at trial. Rule 26(a)(2)(B) mandates that this disclosure shall be accompanied by a written report prepared and signed by the expert witness. Thus, expert witnesses must submit written reports and those reports must be offered prior to the court-imposed discovery deadline. This information must be submitted in accordance with the court's directives. Fed. R. Civ. P. 26(c). Rule 26(a)(2)(B) also requires that the expert's written report include certain structural components which include a complete statement of all opinions to be expressed and the basis and reasons for such opinions, and the date or other information considered by the witness in forming the opinions. These reporting requirements are designed to put a party on notice as to the substance and underpinnings of an expert's testimony. Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 889 (8th Cir. 2006).

It is clear that adherence to a scheduling/discovery plan or case management order is critical to achieving the goal of ensuring a "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. see Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001) ("As a vehicle designed to streamline the flow of litigation through our crowded dockets, we do not take case management orders lightly, and will enforce them"). As a result, the district court has broad

discretion in establishing and enforcing the deadlines established in a scheduling/discovery plan or case management order.

Further, "to ensure that trial does not proceed higgledy-piggledy, the district court has wide discretion to determine the order in which parties adduce proof." Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 758-759 (8th Cir. 2006). As opposed to a case-in-chief expert witness, a rebuttal expert witness is an expert used to refute the disclosed opinions of an opposing party's expert witness. The function of rebuttal testimony is to explain, counteract, or disprove evidence of the adverse party. Rebuttal evidence may be used to challenge the evidence or theory of an opponent, but it is not intended to establish a case-in-chief. Cates v. Sears Roebuck & Co., 928 F.2d 679, 685 (5th Cir. 1991). The primary objective of rebuttal evidence is to permit a litigant to counter new, unforeseen facts brought out in the opposing party's case, but not to be used as a continuation of the case-in-chief. Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 759 (8th Cir. 2006).

The plaintiffs contend that although the discovery deadlines and expert disclosure deadlines were governed by the Court's orders, Rule 26(a)(2)(C) clearly "contemplates the disclosure of a rebuttal expert 30 days before trial." See Docket No. 241, p. 2. The Court strongly disagrees.

With respect to the disclosure of expert witnesses, Rule 26(a)(2)(C) provides as follows:

> These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

Nowhere within the language of Rule 26(a)(2)(C) does it contemplate the disclosure of rebuttal expert witnesses 30 days before trial. Rule 26(a)(2)(C) specifically states that "in the

absence of other directions from the court or stipulation by the parties," the 90-day time limit for expert disclosures before trial or the 30-day time limit after expert disclosures by the other party would apply. The rule speaks in terms of disclosing expert witnesses intended to "contradict or rebut" within 30 days after the initial expert disclosures made by the other party.

In this case, the agreed-upon deadline for the plaintiffs to disclose expert witnesses was April 16, 2007. The stipulated deadline for the defendants to disclose expert witnesses was May 31, 2007. At the very latest, the plaintiffs needed to seek court approval to disclose a "rebuttal" expert witness by June 30, 2007, which would have been 30 days after the defendant's expert disclosure deadline. Rule 26(a)(2)(C) clearly does not allow for the disclosure of a "rebuttal" expert witness on the eve of trial. If any party in a lawsuit was allowed to disclose a "rebuttal" expert witness just 30 days before trial – irrespective of a stipulated deadline or court order for the disclosure of expert witnesses – the federal courts would be inundated with an endless stream of motions for continuances and discovery would never end. There is no question in the Eighth Circuit that the 30-day time limit referred to in Rule 26(a)(2)(C) only applies "in the absence of other directions from the court or stipulation by the parties." Eckelkamp v. Beste, 315 F.3d 863, 872 (8th Cir. 2003). Therefore, the disclosure of Dr. Hamilton as an expert witness is untimely.

Further, the Court finds that Dr. Hamilton cannot, in all fairness, be characterized as a "rebuttal" expert witness. Dr. Hamilton is clearly a liability expert witness who, in accordance with the stipulation of the parties, needed to be disclosed by the plaintiffs by April 16, 2007. The disclosure of a new liability expert witness (Dr. Hamilton) at this late stage not only contravenes the stipulated expert disclosure deadlines agreed to by the parties and approved by the Court on March 14, 2007, but it also flies in the face of fairness and common sense.

A careful review of Dr. Hamilton's report and conclusions served on December 27, 2007, leads any reasonable person to conclude that his testimony does not equate with that of a "rebuttal" expert, but instead, goes to the very heart of this lawsuit and the theories of liability to be presented during the plaintiffs' case-in-chief. Dr. Hamilton has formulated opinions and conclusions that are admittedly new and unique to this case. The inescapable conclusion is that the plaintiffs are attempting to circumvent the Scheduling/Discovery Plan that everyone previously agreed to by unilaterally designating Dr. Hamilton as a rebuttal expert witness. If Dr. Hamilton were allowed to testify at trial it would, at a minimum, require that the Court afford defense counsel an opportunity to conduct further discovery, depose Dr. Hamilton, undertake additional electron microscopy testing and analysis of the gun barrel, and retain additional expert witnesses to refute the opinions proffered by Dr. Hamilton. To allow a new liability expert into this case at this late stage under the guise of characterizing his testimony as "rebuttal" evidence, would only further delay this litigation which has already lingered far too long.[1] The disclosure of Dr. Hamilton as a "rebuttal" expert witness on December 27, 2007, is untimely, unfair, and unwarranted under the circumstances.

III. CONCLUSION

Dr. Hamilton will not be allowed to testify at the trial scheduled to commence on January 22, 2008, either as a "rebuttal" expert witness or as an expert witness called during the plaintiffs' case-in-chief. The Court's views on the late disclosure of Dr. Hamilton were expressed, in part, during the status conference on December 21, 2007. Those views have not changed since that time. The

[1] According to the scheduling clerk, if the trial were to be continued, it could not be rescheduled for an eight day jury trial until at least March of 2009.

record reveals that the parties expressly consented to certain specific deadlines for the disclosure of expert witnesses. The plaintiffs agreed to disclose "liability expert witnesses" by April 16, 2007. Dr. Hamilton, whether designated as a case-in-chief liability expert or as a rebuttal expert, needed to be disclosed months ago rather than on the eve of trial.

Further, the plaintiffs' liability expert who was timely disclosed (Charles Powell), is prohibited from attempting to supplement his opinions at this late stage by incorporating the newly-disclosed opinions of Dr. Hamilton. It appears that in anticipation of this ruling, the plaintiffs recently supplemented Charles Powell's "SSEC Engineering Report" to essentially incorporate the opinions and conclusions formulated by Dr. Hamilton which were first disclosed by fax on December 27, 2007. The supplemental report contains new and different theories of liability. Fairness does not require that the plaintiffs be afforded another chance to marshal Dr. Hamilton's opinions to shore up the case. Dr. Hamilton is prohibited from testifying at trial in any capacity, and expert witness Charles Powell is prohibited from attempting to supplement his engineering report to express new opinions at trial that were not previously disclosed in accordance with the stipulated agreement of the parties and the Court's Scheduling/Discovery plan. However, this order does not prohibit plaintiffs' counsel from using information obtained from, and assistance provided by, Dr. Hamilton to conduct cross-examination of the defendants' liability expert witnesses. Some of the information contained in Dr. Hamilton's report may be appropriate fodder for cross-examination.

In Marmo, the Eighth Circuit Court of Appeals held that "[a]llowance of a party to present additional evidence on rebuttal depends upon the circumstances of the case and rests within the discretion of the individual most able to weigh the competing circumstances, the trial judge." 457 F.3d at 760 (citing Gossett v. Weyerhaeuser Co., 856 F.2d 1154, 1156 (8th Cir. 1988)). The Court

has carefully considered the entire record and weighed all of the competing circumstances, and concludes that Dr. Hamilton's disclosure as an expert witness was untimely. Dr. Hamilton will not be allowed to testify at trial, nor will his opinions be allowed in through the testimony of other expert witnesses who were disclosed on a timely basis.

IT IS SO ORDERED.

Dated this 4th day of January, 2008.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court